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National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 22, 2005

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel 339-2531
Division of Advice 530-4050
530-4090-6000

SUBJECT: Loomis Fargo & Co. 530-5400
Case 31-CA-27125 530-8018-3000

The Region submitted this case for advice as to whether the Employer unlawfully refused to recognize and bargain with the Charging Party Union after it purportedly merged with the existing collective bargaining representative. We conclude that the Employer acted lawfully in that (1) the merger did not occur because the former Union never ceased operations, and (2) the attempted merger, had it occurred, would not have been valid because there would not have been "substantial continuity" between unions and, furthermore, it was done without adequate due process.

FACTS

Loomis Fargo & Co. operates an armored transport/cash handling business out of Ontario, California. Its bargaining unit employees, consisting of from 37-42 individuals in route and vault classifications, belong to the Ontario Armored Car Committee ("OACC"), an independent, in-house union. The most recent collective bargaining agreement with the OACC expires on May 31, 2005.

The OACC does not have articles of incorporation, by-laws, or a constitution. A new employee automatically becomes a member of the OACC. There are no scheduled membership meetings and unit employees do not pay dues or initiation fees. OACC employee representatives are elected at times and at other times simply volunteer for duty, absent employee objections. These employee representatives negotiate collective bargaining agreements with the Employer. Successive collective bargaining agreements have contained a grievance and binding arbitration clause; however, there is no evidence that the OACC has filed a grievance against the Employer in the recent past.

In early Summer 2004,[1] employee Al Moore, the sole OACC representative at the time, along with about 4-6 interested unit employees met with representatives of Charging Party International Union, Security, Police and Fire Professionals of America ("SPFPA") to discuss an OACC merger with the SPFPA. There is no evidence that OACC members discussed a possible merger with the SPFPA prior to this meeting; rather, Moore and his coworkers apparently acted on their own when they contacted SPFPA to discuss a merger. Moore subsequently obtained 34 authorization cards from his fellow employees authorizing the SPFPA to be their bargaining representative, which he turned over to SPFPA representatives.

SPFPA representatives decided to conduct a merger/affiliation vote among unit employees. Moore and the SPFPA decided that, once the merger vote was complete, the OACC would become a local chapter of the SPFPA, adopt the SPFPA by-laws, and retain Moore as the employee representative. Unit employees would also be required to pay $20 monthly union dues. However, Moore did not conduct a formal vote or meet with unit employees to confirm these arrangements.

In early August, the SPFPA sent an announcement of an August 14 meeting to the 34 employees who had signed authorization cards, during which the proposed OACC/SPFPA merger would be discussed. However, only 4-6 unit employees attended the meeting, so the SPFPA decided to conduct the merger vote via secret mail ballot.

On August 25, the SPFPA sent secret ballots to the same 34 employees with instructions to return the ballots by September 10. As of that date, the OACC bargaining unit consisted of 37 employees. Of the 34 individuals who received ballots, four employees were in classifications outside the bargaining unit and five others had been terminated by the time the votes were counted. Additionally, the SPFPA did not send ballots to twelve OACC unit employees either because the employees had never signed SPFPA authorization cards or because they were hired after the cards were collected in the early summer.

The SPFPA received 19 ballots; 17 were cast in favor of the merger and two against. The SPFPA does not know which of the 34 employees who received ballots returned them, as none of the 19 returned ballots bore identifying marks. On September 19, Moore sent a letter to the Employer stating that a majority of the OACC members had voted in favor of

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1 All dates are in 2004, unless otherwise noted.

merging with the SPFPA and requesting that the Employer update its records to reflect this new affiliation. The Employer discharged Moore shortly thereafter; no charge has been filed. The SPFPA subsequently retained Moore as a vice president in charge of the new, successor SPFPA local in which Loomis employees would be placed. There was no discussion among unit employees about Moore's selection as the leader of the purported successor union. On October 19, the Employer responded that it would not recognize OACC's purported affiliation with SPFPA.

About one month after Moore's termination, OACC unit employees selected two current employees as their new OACC representatives. After receiving complaints from unit employees who did not have an opportunity to vote concerning the merger, the OACC representatives decided to conduct a secret ballot election at the jobsite where all unit employees could vote regarding the affiliation with SPFPA. On December 20, 38 out of 42 unit members voted; employees rejected the proposed merger by a vote of 25 to eight, with five abstentions. OACC representatives subsequently notified the Employer of the election results, asked that it not recognize the SPFPA and that it continue to recognize the OACC.

ACTION

We conclude that the Employer lawfully refused to recognize and bargain with the SPFPA as the collective bargaining representative of its employees. Thus, (1) the merger did not occur inasmuch as the former Union never ceased operations, and (2) the attempted merger, had it occurred, would not have been valid because it would not have resulted in a "substantial continuity" between unions and, furthermore, was done without adequate due process.

Initially, we conclude that the merger with the SPFPA itself never occurred because the OACC, as an entity, never elected to undertake that change and never took steps to dissolve itself. OACC members did not collectively decide to affiliate with the SPFPA; rather, Moore and a few of his co-workers simply spoke to SPFPA officials without the unit's prior notice or approval. The membership did nothing to ratify Moore's actions purportedly on their behalf. Specifically, the SPFPA authorization cards signed by some of them did not mention a merger or affiliation in any way. And the September election which purported to resolve the question was marred by irregularities that vitiate its significance. About one-third of the approximately 37 unit employees were not allowed to vote, and nine individuals who received ballots were not in the bargaining unit. Finally, the OACC never went out of existence after the supposed

merger, nor was it preparing to do so. Employees subsequently selected new OACC representatives and ultimately rejected any affiliation in a second election, and requested that the Employer continue to recognize it.

However, even assuming one could conclude that the OACC collectively attempted to merge with the SPFPA, the merger itself would have been ineffective. As a general principle, an employer is relieved of the obligation to bargain with a representative that has merged or affiliated with another union only if the employer proves that the merger or affiliation was accomplished without minimal due process, and/or that it resulted in a discontinuity of representation between the old and new bargaining representatives.[2] Although most union mergers/affiliations result in some degree of change to the union's organizational structure, the Board will intervene in such "internal union matters" only where it finds that the merger/affiliation raises a question concerning representation (QCR).[3] By definition, a QCR exists after a merger/affiliation where there has been a change in representation, "sufficiently dramatic to alter the union's identity."[4] Because substantial continuity depends solely on the identity of the representative remaining the same, it is evaluated in each case by a factual comparison between the "old" and "new" bargaining representatives.[5] No single factor is determinative, and the

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[2] See, e.g., Mike Basil Chevrolet, 331 NLRB 1044, 1044, 1045 (2000); CPS Chemical Co., 324 NLRB 1018, 1019-25 & n.7 (1997), enfd. 160 F.3d 150 (3d Cir. 1998); Western Commercial Transport, 288 NLRB 214, 217 (1988).

[3] Sullivan Brothers Printers, Inc., 317 NLRB 561, 562 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996); Minn-Dak Farmers Coop., 311 NLRB 942, 945 (1993), enfd. 32 F.3d 390 (8th Cir. 1994).

[4] May Department Stores Co., 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir.), cert. denied 498 U.S. 895 (1990) (emphasis and citations omitted). See Mike Basil Chevrolet, 331 NLRB at 1044 ("the significant factor is whether there is an identity change as a result of the [merger or] affiliation").

[5] Relevant factors include: continued leadership responsibilities for existing union officials; extension of membership rights and duties in the new union to former members of the old union; authority to change provisions in the governing documents; changes in dues structure; frequency of membership meetings; continuity in the manner in which contract negotiation, administration, and grievance

Board evaluates the totality of these factors to determine whether substantial continuity has been maintained.[6]

Here, there is no substantial continuity between the OACC and the SPFPA. The OACC is an extremely loosely-knit labor organization. It has no dues, initiation fees or treasury. It has no bylaws, articles of incorporation or constitution. It does not regularly elect representatives, does not hold membership meetings, and has no recent experience representing employee grievances. SPFPA locals, in contrast, exhibit many of the characteristics of any organization affiliated with a nationwide International, including all of the factors listed above. The distinction between the OACC and the SPFPA is dramatic.

Furthermore, as set forth above, the initial September election lacked sufficient "due process" safeguards. All members were not given notice of the election, an adequate opportunity to discuss the proposed merger, or even the right to vote.[7] Employee dissatisfaction with that vote was reflected in the subsequent December tally, which elicited overwhelming employee interest in retaining the OACC as the collective bargaining representative.

Accordingly, for these reasons, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

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processing are effectuated; and the preservation of physical facilities, books, and assets. See Western Commercial Transport, 288 NLRB at 217 (footnote omitted).

[6] Id.; Mike Basil Chevrolet, 331 NLRB at 1044.

[7] See due process factors listed in NLRB v. Financial Institution Employees (Seattle-First National Bank), 475 U.S. 192, 200 (1986). The General Counsel has taken the position that because due process considerations do not impact the identity of the employees' representative, an alleged lack of due process cannot alone raise a QCR. See General Counsel's Motion for Reconsideration and Brief to the Board in Support in Allied Mechanical Services, Inc., Case Nos. 7-CA-40907 and 41390, dated July 12, 2004.